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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/816,014	03/23/2001	Bernd Scholler	6056-000039	8518

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EXAMINER

FERKO, KATHRYN P

ART UNIT	PAPER NUMBER
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3743

/o

DATE MAILED: 04/22/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/816,014

Applicant(s)

SCHOLLER ET AL.

Examiner

Kathryn Ferko

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 26 March 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-34 is/are pending in the application.
- 4a) Of the above claim(s) 17-34 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-16 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ 6) ☐ Other: _____

DETAILED ACTION

This is a response to the amendment dated March 26, 2003. Claims 1-16 remain pending.

Response to Arguments

1. Applicant's arguments with respect to claim 1 have been considered but are not considered persuasive.

Applicant's remarks have been noted and carefully reviewed. The amendment to the specification regarding deletion of element "14" and the amendments to overcome the 35 USC 112 second paragraph rejections are acknowledged. With regard to the prior art rejections, applicant is reminded that the examiner is required to interpret the claims in a reasonably broad sense. Given this requirement, applicant's interpretation of two respiratory parameters is extraordinarily narrow. Axe et al. clearly demonstrate two respiratory parameters. For example figure 2 shows the timewise evolution of two parameters, flow and mask pressure. Applicant's attention is drawn to column 3, lines 45-65. "The differential pressure transducer 45 has one sensing tube 46 connected to the interior of the mask 39. Another sensing tube 47 connects to the output of compressor 43....The pressure difference between sensing tubes 46 and 47 corresponds to the quantity of air flow through the hose 41. Normal breathing causes the difference in pressure sensed by the pressure transducer 45 to fluctuate. Pressure transducer 48 measures only dynamic pressure in the mask." Therefore, clearly 2 different respirator parameters are being detected.

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Figure 2 shows the timewise evolution of a pattern. Furthermore, as recited in column 4, line 45 pharyngeal wall vibrations are also detected. This is clearly another respiratory parameter. Moreover, the respirator device is controlled in an adaptive manner such that the timewise evolution of the at least two respirator parameters maintain, at most, a predefined maximum difference from the typical evolution patterns, as recited in column 4. Additionally, there will be a maximum difference in any system where it will have to be maintained within or else the system will break. With that in mind, applicant has chosen not to recite key features of the invention in the claim language. Given a reasonably broad interpretation of the claim the prior art rejection still applies.

Claim Rejections - 35 USC § 102

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) do not apply to the examination of this application as the application being examined was not (1) filed on or after November 29, 2000, or (2) voluntarily published under 35 U.S.C. 122(b). Therefore, this application is examined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

3. Claims 1-16 are rejected under 35 U.S.C. 102(a or e) as being anticipated by Axe et al.

Axe et al. disclose a procedure for the control of a respirator device, in which one can set at least two different pressure levels for a breathable gas supply and capturing at least two respirator-treatment parameters for the control of respirator-treatment pressure, as recited in columns 3-5, lines 1-5; at least two of the respirator-treatment parameters that are modified as a function of a pattern recognition, as recited in column 3, lines 48-67 and column 4, lines 1-63; in order to carry out the pattern recognition time-wise evolution of at least two respirator-treatment parameters is captured, at least at intervals, and is analyzed with respect to typical evolution patterns, as recited in column 5, lines 55-65, wherein the respiratory device is controlled in an adaptive manner such that the time-wise evolution of the at least two respiratory parameters, at most, a predefined maximum differed from the typical evolution patterns, as recited in column 4; an existing pressure level for breathing support that is overlaid at least temporarily with a stimulating stream oscillating at a defined frequency, as recited in claims 1-7; a selective evaluation of an oscillatory pressure amplitude, that occurs with a frequency of a stimulating stream in the air delivery of a patient; a selection of the respective pressure amplitude is carried out, as recited in column 5, lines 9-32; a CPAP respirator treatment that is carried out, as recited in column 1, lines 15-16; at least one electrical signal that is evaluated during the pattern recognition; a

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physical signal that is evaluated during the pattern recognition; a derivation of classes of errors that is implemented in the context of the pattern recognition, as recited in column 11, lines 1-6; an OPS signal (Oscillating Pressure Signal) is evaluated; as seen in figures 2-4; a static pressure that signal is evaluated; as seen in figures 4-8; a pressure variation that is evaluated, as recited in claims 1-7; flow signal is evaluated; a signal proportional to at least one of the flow signal and pressure-dependent signal is evaluated, as recited in the claims; an electrical-drive parameter of the compressed-gas supply that is evaluated; pattern recognition, in which distinctive form and time features are evaluated; and a class assignment.

Conclusion

2. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kathryn Ferko whose telephone number is (703) 306-3454. The examiner can normally be reached on M-F (7:30-5:00) First Friday Off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Henry A Bennett can be reached on (703) 308-0101. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9302 for regular communications and (703) 872-9303 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1113.

KF
April 9, 2003



Henry Bennett
Supervisory Patent Examiner
Group 3700